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No. 428

In the Supreme Court of the United States

OCTOBER TERM, 1929

JAMES E. TYLER, JR., AND WILLIAM G. TYLER, ADMINISTRATORS OF THE ESTATE OF JAMES E. TYLER, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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No. 428

JAMES E. TYLER, JR., AND WILLIAM G. TYLER, Administrators of the Estate of James E. Tyler, petitioners

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (R. 7–21) is reported in 28 F. (2d) 887. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 30–36) is reported in 33 F. (2d) 724.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 6, 1929. (R. 36.) Petition for

certiorari was filed October 4, 1929. Certiorari was granted November 25, 1929. (R. 37.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The Revenue Act of 1916 imposes a tax upon the transfer of the net estate of every decedent dying after the passage of the Act. Section 202 (c) provides that the gross estate of the decedent shall include the value of property held by the decedent and any other person as "tenants in the entirety," with the exception of such part of the property as may be shown to have originally belonged to the survivor. The questions presented are:

1. Whether this provision imposes a direct tax in violation of the third clause of Section 2 and the fourth clause of Section 9 of Article I of the Constitution.

2. Whether this provision is in contravention of the due process clause of the Fifth Amendment.

STATUTE INVOLVED

The Revenue Act of 1916, c. 463, 39 Stat. 756, 777–778, provides in part as follows:

> SEC. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of

every decedent dying after the passage of this Act, whether a resident or non-resident of the United States:

* * * * *

SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

* * * * *

(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.

* * * * *

By Section 203 provision is made for determining the value of the net estate by deducting certain items and an exemption of $50,000 from the ascertained gross estate. The value of this net estate is the measure of the tax and the amount of deductions allowable in this case is not in dispute.

The Act of March 3, 1917, c. 159, 39 Stat. 1000, and the Act of October 3, 1917, c. 63, 40 Stat. 300, increased the rates of tax but made no other changes in the provision of the 1916 Act in its application to this case.

Regulations of the Treasury Department and extracts from subsequent estate tax statutes are printed in Appendix A, pp. 29–43, *infra*.

STATEMENT

The case was submitted to the District Court upon an agreed statement of facts. (R. 23–25.) So far as material to the issues involved, the facts are as follows: James E. Tyler, a resident of Maryland, died on May 7, 1918, intestate. The petitioners were duly appointed administrators of his estate and are now acting as such. At his death the decedent and his wife were the owners as tenants by the entirety of 349 shares of the capital stock of the Kimball-Tyler Company, a West Virginia corporation doing business in Maryland. The stock was acquired by them by a conveyance from the decedent on November 29, 1917. Prior to that conveyance the decedent was the sole owner of the stock. Its value at the time of his death was $59,183.42, and the Commissioner of Internal Revenue included the stock at that valuation in the gross estate of the decedent, the total of which was $207,454.60.

The petitioners challenged the propriety of this inclusion of the stock in an action brought in the District Court for the District of Maryland to recover the tax paid on account of it, and that court entered judgment for the petitioners in the sum of $3,337.67 with interest. (R. 21.) On appeal, the

United States Circuit Court of Appeals for the Fourth Circuit reversed the judgment of the lower court. (R. 36.) The petitioner thereafter applied to this Court for a writ of certiorari, which was granted. (R. 37.)

SUMMARY OF ARGUMENT

I. The Revenue Acts of 1916 and 1917 provide for inclusion of estates by the entirety in the estate the transfer of which is taxed thereby.

II. This provision does not impose a direct tax and so does not violate constitutional limitations as to direct taxes. Although neither the title nor the estate of the survivor was created by the death of the decedent, there was, nevertheless, a shifting of economic benefits of property upon the decedent's death, occasioned by the death. This shifting may be the subject of an estate tax. The legal fiction that the survivor of an estate by the entirety acquires no enlarged interest or right should not be held determinative here. The "transfer" which may be the basis of a tax should not be restricted to cases where the title or the property passes but may include also the relinquishment by the decedent of possession, enjoyment or control. All the interests of the decedent spouse are terminated at his death; and the practical result of the dissolution of the estate by the entirety by the death of one spouse is to transfer to the surviving spouse an unfettered ownership in fee.

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This Court held in *Bromley* v. *McCaughn*, 280 U. S. 124, that a tax on gifts *inter vivos* is not a direct tax. Upon the principles applied in that case there can be no constitutional objection to a transfer tax payable at death on the value of property owned by the decedent and conveyed by him to himself and wife as tenants by the entirety after the effective date of the Tax Act. If instead of conveying the property he had retained it until his death, its value would have been included in the computation of his estate subject to the estate tax. If he had given it to his wife outright during his lifetime, the gift could have been taxed by an Act passed before the date of the gift. If instead of pursuing either of these courses, he makes a conveyance which operates both as a gift to his wife and as a retention of an interest in the property in himself, the cessation of that interest at his death is a legitimate occasion for a tax.

III. The tax involved here is properly measured and is neither arbitrary nor capricious, and so does not violate the Fifth Amendment. The tax is imposed upon the "transfer of the net estate" and its amount is the sum of certain percentages of the value of the "net estate." It is necessary to set up this artificial entity as the measure of the tax and include therein designated classes of property, in order that certain dispositions of property made by a decedent during his lifetime, but actually testamentary so far as their ultimate effect is concerned, may be reached. The inclusion of estates by

the entirety in the taxable net estate is necessary to prevent tax avoidance and it may consequently be supported as a necessary adjunct to the taxation of testamentary transfers, even if standing alone its constitutionality might have been subject to doubt.

ARGUMENT

I

THE APPLICABLE STATUTE PROVIDES FOR THE INCLUSION IN THE GROSS ESTATE OF THE VALUE OF THE INTEREST IN THE PERSONAL PROPERTY IN QUESTION HELD BY THE DECEDENT AND HIS WIFE AS TENANTS BY THE ENTIRETY

We submit that subparagraph (c) of Section 202 (p. 3, *supra*) must be so construed.

It is not contended by the petitioners in the instant case that Congress, in enacting Section 202 (c) of the Revenue Act of 1916, did not intend to include in the measure of a decedent's gross estate the value of property held by the decedent and the surviving spouse as tenants by the entirety. The section itself plainly indicates this, though its language is "tenants *in* the entirety" rather than the more widely recognized term "tenants *by* the entirety." (Italics ours.) Both the Circuit Court of Appeals in this case and the Circuit Court of Appeals for the Third Circuit in the case of *United States* v. *Provident Trust Co.*, 35 F. (2d) 339, considered such estates as included within the intendment of the section, and the question does not seem pertinent to the issue here raised. See *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348.

Contra, Blount v. *United States,* 59 C. Cls. 328, 347; *Appeal of Susie M. Root,* 5 B. T. A. 696.

The decedent was the sole owner of the stock in question until November 29, 1917, after the passage of the Act under which the tax was assessed. On November 29, 1917, he transferred the stock to himself and his wife as tenants by the entirety (p. 4, *supra*). It does not appear that the wife of the decedent ever before this time had any interest in the stock or that she furnished any part of the consideration for its original purchase. Consequently, there is no ground for applying the exception to Section 202 (c) (p. 3, *supra*). (For the construction of this exception by the Treasury Department see pp. 34–43, *infra.*)

II

THE INCLUSION OF THE INTERESTS OF TENANTS BY THE ENTIRETY IN THE GROSS ESTATE DOES NOT RESULT IN IMPOSING A DIRECT TAX IN VIOLATION OF THE THIRD CLAUSE OF SECTION 2 OR THE FOURTH CLAUSE OF SECTION 9 OF ARTICLE 1 OF THE CONSTITUTION

The constitutionality of the Federal estate tax has been upheld and its nature has been clearly pointed out by this Court. In *New York Trust Co.* v. *Eisner,* 256 U. S. 345, the Court overruled the constitutional objections to the tax and stated that it was an excise tax, "the antithesis of a direct tax."

In *Y. M. C. A.* v. *Davis,* 264 U. S. 47, 50, the Court said:

> What was being imposed here was an excise upon the transfer of an estate upon

> death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death.

In *Edwards* v. *Slocum,* 264 U. S. 61, 62–63, the Court said:

> But this is not a tax upon a residue, it is a tax upon a transfer of his net estate by a decedent, a distinction marked by the words that we have quoted from the statute, and previously commented upon at length in *Knowlton* v. *Moore,* 178 U. S. 41, 49, 77. It comes into existence before and is independent of the receipt of the property by the legatee. It taxes, as Hanson, Death Duties, puts it in a passage cited in 178 U. S. 49, "not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death." It levies a sum equal to a certain percentage of the value of the net estate, and provides the criteria by which the net estate shall be ascertained. * * *

The plan of the tax is well stated in *Farmers' L. & T. Co.* v. *Winthrop,* 238 N. Y. 488, wherein the New York Court of Appeals said of the Federal estate tax (p. 497):

> The tax under the statute is a "tax upon the transfer of the net estate of every dece-

dent." The value of the net estate by which this tax is measured not only includes the value of property which the decedent at the time of his death could dispose of by will or deed and the value of property which the decedent has transferred by deed made in contemplation of death, or to take effect in possession or enjoyment upon his death, but also includes the value of interests of others which ripen upon his death into new rights of possession and enjoyment by operation of law, regardless of the wish of the decedent, such as dower rights or interests held jointly *or as tenants by the entirety*. The transfer which is taxed is not the transfer of separate parts of the decedent's estate by a single instrument nor separate transfers by the decedent of his estate but it is the transfer by death of all that property which is defined by the statute as the "net estate" regardless of how the right of the transferees may arise. The definition of the "net estate" identifies the property the transfer of which is taxed and the value of the "net estate" so defined measures the amount of the tax and its rate; but the tax is not imposed upon the property nor in general is the burden of its payment apportioned in proportion to the value of any portion thereof received by any transferee. (Italics ours.)

Nevertheless, it seems to have been suggested that the inclusion in the gross estate, used in computing the amount of the transfer tax, of the value

of property which is not the legitimate subject of a transfer tax would amount to the imposition of a direct tax. *Chase National Bank* v. *United States*, 278 U. S. 327, 334–35.

The contentions of the petitioners as to the validity of the tax in this case rest in ultimate analysis upon the peculiar nature of tenancy by the entirety. Such tenancy is of common-law origin and is based upon the fiction of the unity of husband and wife. It still prevails in Maryland and applies there to personal as well as to real property. *Brewer* v. *Bowersox*, 92 Md. 567; *McCubbin* v. *Stanford*, 85 Md. 378; *Ades* v. *Caplin*, 132 Md. 66.

Upon the death of a holder by the entirety there is not technically, from a conveyancer's point of view, any transfer of title or of estate, since the survivor throughout the tenure has been seized *per tout et non per my*. It is therefore contended by the petitioners that there is no transmission at death which Congress has power to tax. From this premise it is argued that the tax levied in effect is a direct tax upon the estate by the entirety and invalid because violative of the third clause of Section 2 and the fourth clause of Section 9 of Article I of the Constitution.

We submit that this assumption is not supported by the realities, and that it is upon the realities that the case must be decided.

On the question here involved there is a conflict of opinion. The Circuit Court of Appeals for the

Fourth Circuit has held in the instant case that under the Revenue Act of 1916 estates by the entirety may properly be included in the computation of the Federal estate tax. The Circuit Court of Appeals for the Third Circuit, on the other hand, has decided in the cases of *United States* v. *Provident Trust Co.*, 35 F. (2d) 339, and *Commissioner* v. *Girard Trust Co.*, 35 F. (2d) 343, Nos. 546 and 547, October Term, 1929, of this Court, which are to follow the instant case in argument, that a provision in the Revenue Act of 1921 similar to that here under consideration is unconstitutional in so far as it requires the inclusion in the gross estate of the decedent's interest in estates by the entirety.

The instant case involves estates by the entirety under the law of Maryland; the cases decided by the Circuit Court of Appeals for the Third Circuit involve estates by the entirety under the law of Pennsylvania, but there is no material distinction between the law of these two States which would justify different results in the three cases.

This Court has not passed upon the taxability of the interests in property held by tenants by the entirety under any of the Federal Estate Tax Acts, but we submit that the situation is governed by principles which have been applied in certain cases decided by this Court as well as in certain cases which, we submit, have been decided correctly by the lower Federal courts.

In *Chase National Bank* v. *United States, supra,* this Court upheld the inclusion in the gross estate

of the proceeds of life-insurance policies payable to beneficiaries other than the decedent's estate, which policies were taken out after the effective date of the Revenue Act in question, and which reserved to the insured the right to change the beneficiary. The Court said (p. 337):

> Obviously, the word "transfer" in the statute, or the privilege which may constitutionally be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must, we think, at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another.

(p. 338:)

> Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax, *Chanler* v. *Kelsey,* 205 U. S. 466.

(p. 339:)

> As it is the termination of the power of disposition of the policies by decedent at death which operates as an effec-

> tive transfer and is subjected to the tax, there can be no objection to measuring the tax or fixing its rate by including in the gross estate the value of the policies at the time of death, together with all the other interests of decedent transferred at his death.

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, the Court upheld the constitutionality of the provision of Section 402 (c) of the Revenue Act of 1921 as applied to two trusts created by the decedent before the passage of any statute imposing an estate tax, in which trusts the income was reserved to the settlor (the decedent) for life and on his death was to be paid to a designated person until the termination of the trust, with the remainders over, and by the terms of which trusts there was reserved to the settlor alone a power of revocation of the trusts, upon the exercise of which the trustee was required to return the corpus of the trust to him. The Court held that the Act should not be construed to require the inclusion of five other trusts under which the settlor retained no present interest and no power to modify the terms of the trusts. In this case the Court said (p. 348):

> the miscellaneous items of property required by § 402 to be brought into the gross estate for the purpose of computing the tax, unless the present remainders be an exception, are either property transferred in contemplation of death or property passing out of the control, possession or enjoyment of

> the decedent at his death. They are property held by the decedent in joint tenancy or by the entirety, property of another subject to the decedent's power of appointment, and insurance policies effected by the decedent on his own life, payable to his estate or to others at his death. The two sections, read together, indicate no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death, where he has retained no such control, possession or enjoyment. In the light of the general purpose of the statute and the language of § 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in § 402 (c) "to take effect in possession or enjoyment at or after his death," include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under § 401. That doubt must be resolved in favor of the taxpayer.

Similarly, where, by virtue of a power of appointment, one has a right of disposition of property vested in another, the exercise of that right is a transfer and the property is to be included in his net estate. *Fidelity-Philadelphia Trust Co.* v. *McCaughn,* 34 F. (2d) 600 (C. C. A. 3d), certiorari denied, 280 U. S. 80A. It was there held that Congress has the power to tax any transmission of property effected by death, even though by the law

of decedent's domicile such property was not a part of his estate. See also, *Minis* v. *United States*, 66 C. Cls. 58, certiorari denied, 278 U. S. 657.

So, also, where an owner of property during his lifetime conveys a vested remainder, reserving possession for his life, upon his death there is a transfer of the remainder and such property is to be included in his gross estate. *McCaughn* v. *Girard Trust Co.*, 11 F. (2d) 520 (C. C. A. 3d). The propriety of such treatment is impliedly recognized by this Court in *Reinecke* v. *Northern Trust Co., supra*, p. 348, where it is said that items of property brought into the gross estate for the purpose of computing the tax "are either property transferred in contemplation of death or property passing out of the control, possession or enjoyment of the decedent at his death."

The fact that a tenant by the entirety can not divest his spouse of her estate during his lifetime may seem to distinguish the instant case from those involving a power of revocation or appointment. But we submit that this distinction ignores the very circumscribed tenure held by the spouse during her co-tenant's lifetime, which, upon his death, becomes absolute, thus effecting the same shifting of use and enjoyment that flows from the cessation at the death of the holder of the power to revoke or the power to appoint.

Nor is the present case in this respect distinguishable in principle from the cases determining that the dower, curtesy, or equivalent right of a spouse

is properly to be included in measuring the gross estate of a decedent. In several decisions the Circuit Court of Appeals for the Eighth Circuit has sustained such inclusion upon the broad ground that on the death of the decedent there has been a cessation of the right of possession, use, and enjoyment and a consequent shifting of the economic benefits of property. The absence of any right of disposition in the decedent has been held not material. *United States* v. *Waite,* 33 F. (2d) 567, certiorari denied, 280 U. S. 98A. See also *Allen* v. *Henggeler,* 32 F. (2d) 69, certiorari denied, 280 U. S. 72A; *United States* v. *Dietz,* 33 F. (2d) 576; *Crooks* v. *Loose,* 36 F. (2d) 571.

In *Crooks* v. *Loose,* the court answered the contention that the wife gains no enlarged title or estate by saying (p. 573):

> The Federal Estate Tax Law is not concerned primarily with the character of the interest or estate acquired by the beneficiary, or its subsequent status; but the law is primarily concerned with the ceasing of the interest of the decedent in the property, with the "shifting of economic benefits" of property from the decedent. If there is such a ceasing of the interest of the decedent, such a "shifting of economic benefits," the federal estate tax comes into play.

In the case at bar, although neither the title nor the estate of the survivor was created by the death of the decedent, there was, nevertheless, a very

real shifting of economic burdens and benefits of property occasioned by the decedent's death. Such a shifting may be subject to an estate tax. *Chase National Bank* v. *United States, supra; Reinecke* v. *Northern Trust Co., supra. Cf. Saltonstall* v. *Saltonstall,* 276 U. S. 260.

As to the husband, there was a " termination by death" of "legal incidents of property through which its use or economic enjoyment may be controlled." *Chase National Bank* v. *United States, supra,* p. 335. The husband was a joint owner possessing rights equal to those of his wife and was a part of the marital entity owning the property. While he could not convey it or encumber it he could prevent her from doing so, not as to one-half but as to all. All his interest was terminated at his death. The statute reaches the transfer by death of any of the legal incidents of property through which its use or economic enjoyment may be controlled. *Chase National Bank* v. *United States, supra.* This property which originally was his has been transferred absolutely to his wife. It is apparent that the property was not wholly freed of his dominion and control until his death, and we submit that the cessation of his interest partakes of the general characteristics of a testamentary disposition. It seems obvious that under these circumstances there was at death a shifting of economic benefits, for at that time the wife's right to dispose of the property first arose. At that time

there was a change from a joint interest in the income to a sole interest; there was a change from an equal voice in the management of the property to a sole voice; there was a change from the possibility of testamentary disposition to the certainty of the power of testamentary disposition; the contingency of the husband's survivorship was removed and the wife's right became absolute for the first time.

Furthermore, the legal fiction, prevailing in the State in which decedent had his domicile, that the survivor of an estate by the entirety secures no enlarged interest or right should not necessarily be determinative of questions of Federal taxation. *Weiss* v. *Wiener,* 279 U. S. 333; *United States* v. *Robbins,* 269 U. S. 315, 327; *Burk-Waggoner Association* v. *Hopkins,* 269 U. S. 110. Cf. *Lucas* v. *Earl,* No. 99, October Term 1929, decided by this Court March 17, 1930.

Questions of taxation are eminently practical and, as this Court has said, they are to be determined by the real substance of the transaction and not by its mere form. *Eisner* v. *Macomber,* 252 U. S. 189, 211; *Weiss* v. *Stearn,* 265 U. S. 242, 254. See also *Nicol* v. *Ames,* 173 U. S. 509, 515.

Applying this principle, it is apparent that a taxable transfer occurred upon decedent's death, and that the legal fictions recognized as existing within a State can not be allowed to curb or cripple the taxing power of Congress. Analysis

of the Estate Tax Act makes clear the intention of bringing within its scope all property as to which there is a transfer of use or economic benefit upon the death of a decedent. This inclusiveness is limited so as to apply only to that part of the property which originally belonged to decedent or was purchased solely with his money. (See pp. 22–23, *infra*. Thus the effect of the creation of the tenancy by the entirety is the initial step in the gift from the owner to the spouse, which is completed by the donor's death, for, until death, it could not be ascertained whether the spouse could ever take the property.

The Federal Estate Tax Act deals only with interests and properties of individuals as natural persons. It resolves into their individual elements the interest of the decedent member of the fictional entity and its realization in the survivor. The statute deals with actualities, and no common-law fiction or State enactment can either conceal or obliterate the actual transference to the surviving member of the "entity" of rights and benefits that she previously had shared with the one who has died. Whatever the form, the fact is that a property interest existed in decedent up to the moment of death and at that moment and because of that event it passed to the survivor.

The practical result of the dissolution of an estate by the entirety is to transfer to the surviving spouse an unfettered ownership in fee by the death of the grantor of the estate. Estimating the law by that

result, it is plain that a transfer is occasioned by the death of the grantor irrespective of any legalism which leads to the abstract conclusion that there was no such transfer. The Act must "at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another." *Chase National Bank* v. *United States, supra,* p. 337.

This Court held in *Bromley* v. *McCaughn,* 280 U. S. 124, that a tax on gifts *inter vivos* is not a direct tax. Upon the principles applied in that case there can be no constitutional objection to a transfer tax payable at death on the value of property owned by the decedent and conveyed by him to himself and wife as tenants by the entirety after the effective date of the Tax Act. If, instead of conveying the property, he had retained it until his death, its value would have been included in the computation of his estate subject to the estate tax. If he had given it to his wife outright during his lifetime, the gift could have been taxed by an Act passed before the date of the gift. If, instead of pursuing either of these courses, he makes a conveyance which operates both as a gift to his wife and as a retention of an interest in the property in himself, the cessation of that interest at his death is a legitimate occasion for a tax.

There is a clear relation between a decedent's interest in an entirety and his interest in other

property which ceases at death. Congress has deemed it proper to include such property in the measure of the gross estate in the same way as that disposed of by direct testamentary disposition. Thus it is merely carrying out logically the collection of revenue from the sources made available under the decisions of this Court in *Knowlton* v. *Moore,* 178 U. S. 41, and *New York Trust Co.* v. *Eisner,* 256 U. S. 345, *supra.*

In view of the foregoing it is submitted that the Circuit Court of Appeals in referring to the practical incidents of a tenancy by the entirety was well justified in saying (R. 34):

> To deny that there is a transfer of property in such case resulting from death, is to lose the substance of legal rights while grasping at the shadow.

III

THE TAX INVOLVED HERE IS PROPERLY MEASURED AND IS NEITHER ARBITRARY NOR CAPRICIOUS

It is also contended by petitioners that the tax as measured is so arbitrary and capricious as to amount to confiscation, and thus is in violation of the Fifth Amendment to the Constitution. (Br., pp. 16–17.)

Reference is made to the fact that Section 202 (c) levies a tax upon the estate of one tenant by the entirety measured by the value of the entire property held by both tenants by the entirety "except such part thereof as may be shown to have

originally belonged to such other person and never to have belonged to the decedent." Petitioners contend that the statute thus taxes the adverse interests in the property of the cotenant.

This exception was construed by regulations of the Treasury Department to apply to property owned by the husband and wife as tenants by the entirety and to exclude from the gross estate that proportion of such property which the contribution of the survivor to the purchase price bore to the entire purchase price, or, in case the property was conveyed to the husband or wife without valuable consideration, one-half of the total value of the property. (See pp. 34–43, *infra*.)

When Congress fixed as the measure of the tax "the value of the net estate," it is clear that the rate of the tax was not meant to depend solely upon the transmission by death, *i. e.*, upon the occasion of the tax, but also upon dispositions of property related to that occasion. The tax is imposed upon the "transfer of the *net estate*," and its amount is the sum of certain percentages of the *value of the net estate*. It was necessary to set up this artificial entity as the measure of the tax and include therein designated classes of property, in order that certain dispositions of property made by a decedent during his lifetime, but actually testamentary so far as their ultimate effect is concerned, might be reached.

Accordingly, while death is the generating source of the tax, there is included in its measure certain transactions made during the lifetime of a decedent. This is permissible where the transactions bear a substantial relationship to the occasion of the tax. See *Nichols* v. *Coolidge*, 274 U. S. 531, 542.

What the Act measures is the value of property which originally belonged to the decedent and over which he retained a measure of dominion and control until his death. During his lifetime he was seized of an entire estate in the entire property and he had a right of survivorship in the whole. The property was procured through an expenditure by him and his death alone is the occasion for the tax. In the only case in which this Court has held that a provision of a Federal Estate Tax Act violates the Fifth Amendment, it nevertheless recognized that Congress may require that property which has been transferred before death to avoid the tax may be treated as part of the estate. *Nichols* v. *Coolidge*, *supra* (p. 542). We submit that it is equally appropriate to measure the tax here by the value of the property which has been freed from the burden of the husband's control and right of survivorship by his death. When the decedent caused his own property to be conveyed to himself and his wife as tenants by the entirety, he in effect made a contingent gift to his wife of the fee simple of that property, which was not fully effective until his death.

Finally, it is clear that without some such provision as paragraph (c) of Section 202, *supra,* married taxpayers, in States where tenancy by the entirety exists, could very generally evade the estate tax law by putting large holdings of property into estates by the entirety. It is the plain intent of the law to prevent this avoidance of tax and to secure to the Government its revenue whenever decedent's interest in property of any kind ceases by reason of death.

This Court has often recognized that a measure may be valid as a necessary adjunct to a matter that lies within legislative power, even though, standing alone, its constitutionality may have been subject to doubt. *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 201; *Ruppert* v. *Caffey,* 251 U. S. 264, 289; *Everard's Breweries* v. *Day,* 265 U. S. 545, 560.

If this statute falls, the cases of testamentary disposition of property among married taxpayers through the creation of estates by the entirety will be many. Therefore, in further support of this statute, the Government relies upon the broad ground that it is an integral part of an entire taxing scheme found necessary by Congress in satisfying the needs of the Government for revenue. This principle was given affirmation in the case of *Taft* v. *Bowers,* 278 U. S. 470, wherein it was held that the provision of Section 202 (a) (2) of the Revenue Act of 1921, which required the donee to use the cost of the property to the donor

as a basis for computing profit for income-tax purposes, is constitutional so far as it taxes to the donee, as income, increment in the value of a gift which accrued prior to its acquisition by the donee. In its opinion the Court said (p. 482):

> The provision of the statute under consideration seems entirely appropriate for enforcing a general scheme of lawful taxation. To accept the view urged in behalf of petitioner undoubtedly would defeat, to some extent, the purpose of Congress to take part of all gain derived from capital investments. To prevent that result and insure enforcement of its proper policy, Congress had power to require that for purposes of taxation the donee should accept the position of the donor in respect of the thing received. And in so doing, it acted neither unreasonably nor arbitrarily.

The property, the value of which petitioners contend should not be included in the gross estate, belonged to the decedent until after the passage of the applicable Tax Act. The tenancy by the entirety in this property was created after that Act became effective. Certainly the Act, in so far as it relates to such property, is free from constitutional objections. *See Lewellyn* v. *Frick*, 268 U. S. 238; *Shwab* v. *Doyle*, 258 U. S. 529. *Cf. Knox.* v. *McElligott*, 258 U. S. 546; *Blount* v. *United States*, 59 C. Cls. 328, appeal dismissed on motion of the Solicitor General, 273 U. S. 769.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

WILLIAM D. MITCHELL,
Attorney General.

G. A. YOUNGQUIST,
Assistant Attorney General.

CLAUDE R. BRANCH,
SEWALL KEY,
J. LOUIS MONARCH,
RANDOLPH C. SHAW,
Special Assistants to the Attorney General.

ERWIN N. GRISWOLD,
Attorney.

APRIL, 1930.

APPENDIX A

STATUTES

The Revenue Act of 1916 (Act of September 8, 1916, c. 463, 39 Stat. 756, 777–778) in Title II (Estate Tax) provided in part:

> SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:
>
> * * * * *
>
> (c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.
>
> * * * * *

Section 300 of the Act of March 3, 1917, c. 159, 39 Stat. 1000, 1002, and Section 900 of the Revenue Act of 1917 (Act of October 3, 1917, c. 63, 40 Stat. 300, 324) increased the rates of the Estate Tax but made no other changes in this tax.

The Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057, 1097) in Title IV (Estate Tax) contained the same provision except that it was renumbered to be Section 402 (d).

The Revenue Act of 1921 (Act of November 23, 1921, c. 136, 42 Stat. 227, 278) in Title IV (Estate Tax) provided in part:

> SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of one-half of the value thereof;
>
> * * * * *

The Revenue Act of 1924 (Act of June 2, 1924, c. 234, 43 Stat. 253, 304) in Title III (Estate Tax) provided in part:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then

to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U. S. C., Title 26, Sec. 1094.)

In the Revenue Act of 1926 (Act of February 26, 1926, c. 27, 44 Stat. 9, 70–71; U. S. C. App., Title 26, Sec. 1094) in Title III (Estate Tax) Section 302 (e) is the same as Section 302 (e) in the Revenue Act of 1924, set out above, except that in the two places in which it appears the phrase "a fair consideration" is replaced by the phrase "an adequate and full consideration"; and Section 302 (h) is the same in the two Acts, except that in the Revenue Act of 1926, the words "Except as otherwise specifically provided therein" are inserted at the beginning of the subsection.

No changes were made in this provision by the Revenue Act of 1928 (Act of May 29, 1928, c. 852, 45 Stat. 791).

CONGRESSIONAL COMMITTEE REPORTS

Revenue Act of 1921

In the Report of the Committee on Ways and Means, House Report No. 350, 67th Cong., 1st sess., it was said (p. 15):

TITLE IV.—ESTATE TAX

Sections 401 to 404, inclusive, would clarify some doubts which have arisen under the revenue act of 1918 with regard to the estate tax and also make a few substantive changes in the law. Section 401 [402?] liberalizes the law as it relates to property held jointly or as tenants in the entirety by the decedent and any other person. * * *

In the Report of the Committee on Finance, Senate Report No. 275, 67th Cong., 1st sess., it was said (p. 24):

TITLE IV.—ESTATE TAX

* * * * *

Section 402 (d) removes the uncertainties in the existing law relating to interests held jointly or as tenants in the entirety, and conforms to the construction which has been given this section by the Bureau of Internal Revenue.

Revenue Act of 1924

In the Report of the Committee on Finance, Senate Report No. 398, 68th Cong., 1st sess., it was said (p. 35):

Section 302 (e): The provisions of the House bill and the existing law have been reworded to secure greater clarity.

Section 302 (h): This subdivision provides that the property interests which are included in the gross estate for purposes of the estate tax are those enumerated in this section, whether such interests were created or arose or were relinquished before or after the enactment of this act.

A similar provision is included in subdivision (c) [relating to trusts] of section 402 of the existing act [Revenue Act of 1921].

> It has seemed desirable to extend this provision expressly to the other property interests set forth in this section.

In the Conference Report, House Report No. 844, 68th Cong., 1st Sess., it was said (p. 25):

> The provision of the House bill with reference to that part of the gross estate made up of property held by the decedent as a joint tenant or as a tenant by the entirety has been reworded for purposes of clarity. * * *

REGULATIONS

Regulations No. 37 (1916 ed.), promulgated October 10, 1916, under the Revenue Act of 1916, provided in part:

> ART. IV. The gross estate of a decedent, as defined in Section 202 [of the Revenue Act of 1916 (p. 29, *supra*)], includes:
>
> * * * * *
>
> PROPERTY OWNED JOINTLY
>
> (3) Decedent's share in joint bank accounts or in any other property owned by decedent jointly with another or with others as tenants in entirety. Only such part of such property as can be shown never to have been owned by the decedent can be excluded from his gross estate.

Extract from Treasury Decision 2450, being a letter of February 14, 1917, signed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury:

* * * * *

> You will note that, under section 202, paragraph C, there is required to be included in the gross estate of a decedent all the interest held jointly or as tenants in the en-

tirety by the decedent and another person, "except such part thereof as may be shown to have *originally* belonged to such other person and never to have belonged to the decedent." Under this paragraph of the taxing act, wherever the public records show property in the name of the decedent, the presumption is that it was the sole property of the decedent, and the burden of proving that another person owned, prior to the decedent's death, any interest therein is not upon the Government but is upon the estate.

You will note the extremely limiting terms of the paragraph quoted above, and that it must be shown that any part of the property to be excluded from the gross estate must have actually belonged in the first instance to a person other than the decedent and that it has never been owned by the decedent. If, under the Texas law, property conveyed to a husband or wife during their marriage is taken by each in entirety and in such a manner that it could not be contended that any specific part belonged to either, but that each was the owner of all, and upon the death of either no new interest or title vested in the survivor, as is the case in some States, the Government, under a strict and technical interpretation of paragraph C of section 202, would perhaps be justified in demanding that the whole of the property thus owned be included as a portion of the gross estate of the decedent. This, however, does not seem to have been the intent of Congress, and it has heretofore been ruled in a similar case that one-half of the property thus jointly owned should be returned as a portion of the gross estate of the decedent husband or wife, as the case might be.

* * * * *

Regulations 37 (1919 ed.), promulgated August 8, 1919, under the Revenue Act of 1918, and as revised in January, 1921, provided in part:

ART. 27. *Property held jointly or as tenants in the entirety.*—The statute provides for the taxation of interests held jointly, or as tenants in the entirety, by the decedent and any other person or persons. This class of property includes all interests, whether in real or personal property, in which the survivor takes the entire property by right of survivorship, and it consequently does not form part of the decedent's estate for purposes of administration. It does not include interests held as tenants in common, where the interest of each tenant passes to his estate, free from any right of survivorship.

The following are examples of this class of property: Real estate held jointly; real estate held by husband and wife (known as an estate in the entirety); money deposited in a bank or trust company in the joint names of the decedent and another and payable to either or the survivor; joint trading accounts with brokers; stocks and bonds held in the joint names of several owners.

[This Article was amended by Treasury Decision 3951 (see pp. 42–43, *infra*), effective December 29, 1926.]

ART. 28. *Taxable portion.*—The value of such property to be returned for tax is the value of the entire property, unless it can be shown that part of it originally belonged to the other joint owner and never belonged to the decedent. In order to exclude any part of such property from the gross estate the executor must show an original contribution of value by some person other than the decedent. If such a contribution can

be established, the proportion thereof to the entire purchase price represents the interest in the property which should be excluded from the gross estate. Three cases may arise: (1) The decedent may have paid the entire purchase price, in which case the entire property should be included; (2) the decedent may have paid only a portion of the purchase price, in which case only a corresponding portion of the property should be included; (3) the decedent may have paid no part of the purchase price, in which case no part of the property should be included. In the case of bank deposits, the same rule applies; that is, the interest of the decedent in the account is determined by the amount of his contribution. For example: An account of $1,000 is opened, of which the decedent contributes one-half. Interest of $40 has accumulated at the time of the decedent's death, and nothing has been withdrawn. Under these facts $520 should be included in the gross estate.

ART. 29. *Husband and wife.*—Property owned by husband and wife as tenants in the entirety is governed by the rule given above. The whole value of the property must be included, in the absence of a showing as to the original contributions. An exception is made, however, where property is conveyed to husband and wife without valuable consideration, or where the property was purchased out of common funds, representing the savings of husband and wife, or was the fruit of joint labor, the proportion of the several contributions having been lost sight of. In such cases one-half of the total value of the property should be returned.

[This Article was revoked by Article 106 of Regulations 63 (see p. 41, *infra*).]

Regulations 63, promulgated under the Revenue Act of 1921, provided in part:

ART. 23. *Property held jointly or as tenants by the entirety.*—The statute provides for the inclusion in the gross estate of interests held jointly by the decedent and any other person or persons, and of estates by the entirety. This class of property includes all interest, whether in real or personal property, where the survivor takes the entire property by right of survivorship, and consequently the decedent's interest therein forms no part of his estate for purposes of administration. It does not include interests held as tenants in common, where the interest of each tenant passes free from any right of survivorship.

The following are examples of this class: Real estate held by joint tenants; real estate held by husband and wife (known as an estate by the entirety); money deposited in a bank or trust company in the joint names of the decedent and another and payable to either or the survivor; and, in general, all securities and other personal property, where the title thereto was vested in the decedent and one or more other persons, subject to the right of survivorship.

[This Article was amended by Treasury Decision 3951 (see pp. 42–43, *infra*), effective December 29, 1926.]

ART. 24. *Taxable portion.*—The entire value of such property is prima facie a part of the decedent's gross estate, but as it is not the intent of the statute that there should be so included a greater part or proportion thereof than is represented by an outlay of funds, which, in the first instance, were de-

cedent's own, or more than a fractional part equal to that of the other joint owner where neither had parted with any consideration in its acquirement, facts, which in a given case bring it within any one of the exceptions enumerated in the statute, may be submitted by the executor.

Whether the value of the entire property, or only a part, or none of it, enters into the make-up of the gross estate, depends upon the following considerations: (1) So much of the property (whether the whole, or a part thereof) as originally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth, forms no part of the decedent's gross estate. (2) Where the facts are otherwise the same as in (1), but the decedent paid to such other joint owner a consideration for the interest by him (the decedent) acquired in the property, then such portion of the value of the property, proportionate to the consideration so paid, constitutes a part of the gross estate. (3) Where the property, or a part thereof, or a part of the consideration wherewith it was acquired, had at any time been acquired by the other joint owner from the decedent as a gift, or for less than a fair consideration in money or money's worth, then such portion of the value of the entire property, proportionate to the consideration, if any, which in the first instance was paid from such other joint owner's own funds, forms no part of the gross estate. (4) Where the property was acquired by the decedent and his or her surviving spouse as tenants in the entirety by gift, will, or inheritance, then but one-half of the value of the property becomes

a part of the gross estate. (5) Where acquired by the decedent and the other joint owner as joint tenants by gift, will, or inheritance, and their interests are not otherwise specified, or fixed by law, then one-half only of the value of the property is a part of the gross estate; or, where so acquired by the decedent and two or more persons, and the interests of the several joint tenants are not otherwise determinable, then the decedent and the other joint tenants surviving him shall each be deemed the owner of an equal fractional part, and the value of one only of such fractional parts is to be included in the gross estate.

The following are given as illustrative: (*a*) The decedent may have furnished the entire purchase price, in which case the value of the entire property should be included in his gross estate; (*b*) the decedent may have furnished a part only of the purchase price, in which case only the value of a corresponding portion of the property should be so included; (*c*) the decedent, prior to acquisition of the property by himself and the other joint owner, may have given to the latter a sum of money which later constituted such other joint owner's entire contribution to the purchase price of the property, in which case the entire value of the property should be included; (*d*) the other joint owner, at a date prior to the acquirement of the property, may have acquired from the decedent, for less than a fair consideration in money or money's worth, property which thereafter became as such, or in a converted form, part of the purchase price of the property. In such a case, the value of the property to be included is to be reduced proportionately to the consideration furnished by the other joint owner in the original transaction; (*e*)

the decedent may have furnished no part of the purchase price, in which case no part of the property should be included; (*f*) the decedent and spouse may have acquired the property by will as tenants by the entirety, in which case one-half of the value of the property should be included.

ART. 106. * * * Regulations 37 (revised January, 1921) remain in full force and effect, subject to the following changes:

* * * * *

Articles 29 [and others] are revoked.

Regulations 68, promulgated under the Revenue Act of 1924, provided in part:

ART. 22. *Property held jointly or as tenants by the entirety.*—The foregoing provisions of the statute extend to joint ownerships, wherein the right of survivorship exists, and specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed towards the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. The statute applies to all classes of property, whether real or personal, where the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for purposes of administration. It does not include property held by the decedent and any other person or persons as tenants in common.

Article 23 of Regulations 68 is substantially the same as Article 24 of the Regulations 63, quoted *supra*, pp. 38–41.

Articles 22 and 23 of Regulations 70 (1926 ed.), promulgated August 24, 1926, under the Revenue Act of 1926, are the same as Articles 22 and 23 of Regulations 68, *supra*.

Treasury Decision 3951, approved December 29, 1926, reads as follows:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 27 of Regulations 37 (revised January, 1921), and article 23, Regulations 63, are hereby amended to read as follows:

Property held jointly or as tenants by the entirety.—The statute provides for the inclusion in the gross estate of interests held jointly by the decedent and any other person or persons, and of estates by the entirety: This provision applies only to a joint tenancy, or a tenancy by the entirety, created subsequent to the passage of the revenue act in force and effect at the time of the decedent's death. This class of property includes all interests, whether in real or personal property, where the survivor takes the entire property by right of survivorship, and consequently the decedent's interest therein forms no part of his estate for purposes of administration. It does not include interests held as tenants in common, where the interest of each tenant passes free from any right of survivorship.

The following are examples of this class: Real estate held by joint tenants; real estate held by husband and wife (known as an estate by the entirety); money deposited in a bank or trust company in the joint names of the decedent and another and payable to

either or the survivor; and, in general, all securities and other personal property, where the title thereto was vested in the decedent and one or more other persons, subject to the right of survivorship.

These amendments apply only to the estates of decedents who died prior to the effective date of the revenue act of 1924.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved December 29, 1926:

A. W. MELLON,
Secretary of the Treasury.

Treasury Decision 4248, promulgated November 23, 1928, provides:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 22 of Regulations 68 and 70 is hereby amended by adding thereto the following sentence:

The statute applies only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved November 23, 1928:

A. W. MELLON,
Secretary of the Treasury.

In Regulations 70 (1929 ed.), promulgated March 23, 1929, under the Revenue Act of 1926 as amended by the Revenue Act of 1928, Article 23 of the former edition remains unchanged, but Article 22 is amended by adding at the beginning a sentence incorporating Treasury Decision 4248, *supra.*

Appendix B

English and New York Statutes and Decisions

The treatment of tenancies by the entirety by the Federal Government is similar to the treatment of such interests in England.

The Finance Act, 1894 (57 & 58 Vict. c. 30), created what is called an estate duty. That Act provides in Section 2 that the tax should be imposed on all property, real or personal, "which passes on the death" of every person dying after the enactment of the law. In a note to this section found in Hanson, Death Duties (7th ed.), p. 63, the following appears:

> The "passing" may also result from the legal position of two persons to each other. Thus, husband and wife, married before the Married Women's Property Act, 1882, were tenants by entireties of real estate devised to them during their lives or the life of the longest liver. During the joint lives the husband alone was entitled to the rents, and the wife had no equity to a settlement (*Ward* v. *Ward*, 14 Ch. D. 506). Therefore, on the husband's death, after the 1st August, 1894, duty is payable on the whole property, as passing on his death.

It thus seems apparent that England, in the administration of the estate duty, has disregarded the common-law fiction with respect to estates by the entirety (prior to the abolition of such estates by the Married Women's Property Acts) and has supported the view that such estates "passed" very

largely upon the same considerations as are here urged by the Government, namely, that valuable rights ceased upon the husband's death with a consequent legal and factual enlargement of the wife's interest.

So also does the New York state transfer tax law, which is based "upon the transfer" of any property, require an inclusion of estates by the entirety among transfers by death. By N. Y. Laws 1915, c. 664, enacting subdivision 7 of Section 220 of Chapter 60 of the Consolidated Laws, it was provided that estates by the entirety should be subject to the estate tax in the same manner as though the whole property belonged absolutely to the deceased tenant by the entirety. This provision was amended by N. Y. Laws 1925, c. 143, to provide that the tax in the case of a tenancy by the entirety should be assessed as though one-half of the property belonged to the deceased tenant by the entirety. This amendment also renumbered the provision, making it Section 220 (5) of Chapter 60 of the Consolidated Laws.

The New York courts have held that the 1915 amendment is not retroactive (*Matter of Lyon,* 233 N. Y. 208), but that, as to a tenancy by the entirety created after the effective date of the Act the tax is valid and is to be imposed upon the entire estate held by the tenants by the entirety as if the whole had passed by will. *Matter of Lyon, supra; Matter of Dunn,* 236 N. Y. 461.

U. S. GOVERNMENT PRINTING OFFICE: 1930